U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

[redacted]

Date: DEC 2 6 2013 Office: NEBRASKA SERVICE CENTER FILE: [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at http://www.uscis.gov/forms for the latest information on fee, filing location, and other requirements.** *See also* 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

Elizabeth McCormack

Ron Rosenberg
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition. The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an electronic payment systems industry business. It seeks to employ the beneficiary permanently in the United States as a hyperion lead systems analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not meet the job qualifications stated on the labor certification. Specifically, the director determined that the labor certification required a bachelor's degree with five years of progressive experience, and that the petitioner failed to demonstrate that the beneficiary meets the experience requirements of the position. The director denied the petition accordingly.

On appeal, counsel asserts that the beneficiary meets the minimum experience required for the position.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The petitioner has submitted evidence to show that the beneficiary possesses a bachelor's degree in computer applications. The petitioner has also submitted employment letters pertaining to the beneficiary's work experience. The issue in this case is whether the beneficiary's degree and work experience constitute a U.S. advanced degree or a foreign degree equivalent and meet the requirements of the labor certification.

As noted above, the DOL certified the ETA Form 9089 in this matter. The DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified, and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien

is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman,* 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Evidence of qualifying experience shall be in the form of letters from former employers which include the name, address, and title of the writer and a specific description of the duties performed. If such evidence is unavailable, other documentation relating to the experience will be considered. 8 C.F.R. § 204.5(g)(1).

In this matter, Part H, line 4, of the labor certification reflects that a bachelor's degree in computer science, engineering, math, physics, or a related technology field is the minimum level of education required. Line 6 reflects that 60 months of experience in the job offered is required. Line 7 indicates that there is an alternate field of study that is acceptable to the petitioner that mirrors the bachelor's degree field of study. Line 8 reflects that the petitioner is not willing to accept an alternative combination of education and experience. Line 9 reflects that a foreign educational equivalent is acceptable. Line 10 reflects that the petitioner is willing to accept the beneficiary's 60 months of work experience in a computer-related occupation.

The beneficiary set forth his credentials on the labor certification and signed his name under a declaration that the contents of the form are true and correct under the penalty of perjury. The beneficiary stated on the labor certification at Section J.11 that he received a bachelor's degree equivalent in computer applications from [redacted] located in New Delhi, India, in 2003. The record reflects that the beneficiary has earned the equivalent of the requisite United States bachelor's degree, in December 2003. On the section of the labor certification eliciting information of the beneficiary's five years of work experience in the job offered, he represented the following:

- That he was employed by the petitioner since January 30, 2012 as a hyperion lead systems analysis.
- That he was employed by [redacted] as a senior staff, Enterprise SWE from July 12, 2010 to January 27, 2012.
- That he was employed by [redacted] as a senior hyperion consultant from October 1, 2009 to July 9, 2010.
- That he was employed by [redacted] as a hyperion consultant from June 25, 2007 to September 30, 2009.
- That he was employed by [redacted] as a part-time graduate assistant from August 22, 2005 to May 5, 2007.

The petitioner submitted the following evidence of the beneficiary's employment:

- A letter dated December 14, 2012 from a professor of finance at who stated that the university employed the beneficiary as a part-time graduate assistant (working an average of 20 hours per week) from August 22, 2005 to May 5, 2007. The declarant described the beneficiary's progressive job duties in hyperion application administration, development and support. The AAO acknowledges the beneficiary's 10 months of qualifying employment with

- Letters dated December 18, 2012 and September 4, 2013 from (former supervisor of and , who stated that the beneficiary was employed by as a full-time hyperion consultant from June 25, 2007 to September 30, 2009. The declarant stated that he supervised the beneficiary during his employment at and he described the beneficiary's job duties in hyperion application administration, development and support. He also stated that was acquired by in October 2009. The letter is not on company letterhead and the declarant fails to specify the length of his employment with as a supervisor. Furthermore, the declarant fails to indicate that he supervised the beneficiary in New Jersey in 2007, , Virginia in 2008 and in Vienna, Virginia in 2009, as the beneficiary's employment statements and Forms W-2 listed below indicate were his respective addresses during that period. The petitioner has not established that secondary evidence as defined at 8 C.F.R. § 103.2(b)(2) should be accepted in lieu of the required evidence at 8 C.F.R. § 204.5(g)(1). As such, the evidence from will not be accepted.

- A copy of a paystub from showing that that the beneficiary was paid wages in the amount of $1,578.27, with a pay date of August 1, 2007, for the first full pay period of the beneficiary's employment with and listing the beneficiary's address as New Jersey.

- A copy of a Form W-2 issued by showing that the beneficiary received wages in the amount of $85,510.83 in 2008, and listing the beneficiary's address as Virginia.

- A copy of a paystub from showing that the beneficiary was paid wages in the amount of $3,593.75, with a pay date of October 1, 2009, and listing the beneficiary's address as , Virginia. The pay stub shows year-to-date wages of $71,875.00, and represents payment through the last day of the beneficiary's claimed employment with

- A letter dated January 9, 2013 from the president of who stated that the company employed the beneficiary as a full-time senior hyperion consultant from October 1, 2009 to July 9, 2010. The declarant described the beneficiary's job duties in hyperion application administration, development and support. This letter contradicts the statements made in the addendum to the Asset Purchase Agreement between and dated October 30, 2009. The addendum stated in part: " agreed to transfer the employees listed in the attached Exhibit, to . The effective date of the transfer of these employees is November 16, 2009." The agreement further states that the employees would be on the payroll of with an effective date of January 4, 2010. Furthermore, the record of proceeding contains a copy of the official incorporation record from the state of Delaware which shows that the company was duly incorporated on October 22, 2009. Thus, could not have employed the beneficiary from October 1, 2009. The AAO acknowledges the beneficiary's experience with from January 4, 2010 to July 9, 2010 (6 months).

- A letter dated December 20, 2012 from a human resource manager who stated that the beneficiary was employed by full-time as a senior staff, enterprise software engineering from July 12, 2010 to January 27, 2012. The declarant described the beneficiary's job duties in hyperion application administration, development and support. A second letter from dated September 22, 2008 states that the beneficiary was working as a contractor since July 2007. The declarant does not indicate the beneficiary's duties performed in the position. The AAO acknowledges the beneficiary's qualifying experience with from July 12, 2010 to January 27, 2012 (18 months plus 15 days).

The petitioner submitted the following employment statements in response to the director's Notice of Intent to Deny (NOID):

- A letter dated July 18, 2013 from the HR director who stated that the beneficiary was employed by as a full-time software engineer from January 5, 2004 to August 12, 2005, and that he performed various software engineering duties. The declarant fails to specify the beneficiary's job duties. The beneficiary did not list as a former employer on the labor certification. In *Matter of Leung,* 16 I&N Dec. 2530 (BIA 1976), the Board's dicta notes that the beneficiary's experience, without such fact certified by DOL on the beneficiary's Form ETA 750B, lessens the credibility of the evidence and facts asserted.

- A letter dated July 17, 2013 from the senior project manager at who stated that the beneficiary was employed by

as a full-time software engineer from January 5, 2004 to August 12, 2005, and that he supervised the beneficiary in his capacity as a team lead. The declarant described the beneficiary's duties. The petitoner has not established that secondary evidence may be accepted in lieu of the evidence required of the regulation at 8 CFR §103.2(b)(2). Thus, the AAO will not accept the beneficiary's experience with

On appeal, counsel asserts that the beneficiary had in excess of five years of progressive post-bachelor's qualifying work experience prior to the priority date of December 7, 2012. Counsel further asserts that even without relying on the beneficiary's work experience gained by working for the petitioner, he met the qualifying work experience requirement based upon the evidence originally submitted in the Form I-140 petition. Counsel lists the beneficiary's work experience totals as illustrated in the table below:

Company Name	**Job Title**	**Dates of Employment**	**Total # of Hours**
	Software Engineer	01/05/04- 08/12/05	18 months
	p/t grad assistant	08/22/05-05/05/07	10 months
	Sr. hyperion consult	10/01/09-07/09/10	9 months
	Senior staff/enterprise software engineering	07/12/10-01/27/12	18 months
	Hyperion Lead systems analyst	01/30/12-12/06/12	10 months
TOTAL	**TOTAL**	**TOTAL**	65 months (five years and five months)
Company Name	**Job Title**	**Dates of Employment**	**Total # of Hours**
	p/t grad assistant	08/22/05-05/05/07	10 months
	Hyperion consult	06/25/07-09/30/09	27 months
	Sr. hyperion consult	10/01/09-07/09/10	9 months
	Senior staff/enterprise software engineering	07/12/10-01/27/12	18 months
TOTAL	**TOTAL**	**TOTAL**	64 months (5 years and 4 months)

Counsel asserts that only the Department of Labor (the DOL) can make decisions as to questions of substantial similarity of PERM positions. Nevertheless, in response to question J.21, which asks, "Did the alien gain any of the qualifying experience with the employer in a position substantially comparable[1] to the job opportunity requested," the petitioner answered "no." In general, if the answer

[1] A definition of "substantially comparable" is found at 20 C.F.R. § 656.17:

to question J.21 is no, then the experience with the employer may be used by the beneficiary to qualify for the proffered position if the position was not substantially comparable and the terms of the ETA Form 9089 at H.10 provide that applicants can qualify through an alternate occupation. Here, the beneficiary indicates in response to question K.1 that his position with the petitioner was as a hyperion lead systems analyst. Therefore, the experience gained with the petitioner is substantially comparable as he was performing the same type of job duties more than 50 percent of the time as that required in the proffered position (hyperion lead systems analyst). According to DOL regulations, therefore, the petitioner cannot rely on this experience to establish that the beneficiary qualifies for the proffered position.[2]

The employment statements are insufficient to establish the beneficiary's employment experience. To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is December 7, 2012. *See Matter of Wing's Tea House*, 16 I&N Dec. 158. As noted above, the petitioner submitted a copy of an asset purchase agreement between dated October 30, 2009. The agreement is accompanied by an addendum that was signed by the relevant parties on January 12, 2010. Although the declarant stated in the letter that it employed the beneficiary since October 1, 2009, the addendum specifically states that the effective date of employee's transfer would be November 16, 2009, and that the employees would be on the payroll of with an effective date of January 4, 2010.

Counsel asserts that there has been no evidence of fraud relating to the beneficiary's employment at and that the employment letter submitted by the beneficiary's former supervisor is sufficient to establish his employment with that company. Contrary to counsel's claim, the evidence is insufficient to establish that the beneficiary was employed by whose address is in Iselin, New Jersey. The declarant, who represented that he was a former supervisor of indicated that the beneficiary was employed by the company from June 25, 2007 to September 2009. However, the paystubs and Form W-2 issued by to the beneficiary lists the company's address as 33 Wood Avenue in Iselin, New Jersey and

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5) For purposes of this paragraph (i):

. . .

(ii) A ''substantially comparable'' job or position means a job or position requiring performance of the same job duties more than 50 percent of the time. This requirement can be documented by furnishing position descriptions, the percentage of time spent on the various duties, organization charts, and payroll records.

[2] The record does not establish that the DOL considered whether the beneficiary's experience with the petitioner as a hyperion lead systems analyst was substantially comparable, or that DOL's approval of the labor certification application constitutes acceptance of the beneficiary's experience with the petitioner as not substantially comparable.

the beneficiary's address as Virginia on his on his Form W-2 for 2008, and his pay stub from for September 2009 lists his address as Virginia. Although claims to have employed the beneficiary from October 1, 2009 to July 9, 2010, the address listed on its stationery is in New Jersey while the beneficiary's address during that period is listed as Virginia on the company issued pay stubs for 2010. As noted above, there is no evidence in the record to demonstrate that the declarant supervised the beneficiary at all locations in and New Jersey. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho* at 582.

Moreover, the petitioner has not established that primary evidence is unavailable and that secondary evidence in the form of letters and affidavits from others are sufficient to prove the beneficiary's work experience at *See* 8 CFR §103.2(b)(2).

The regulation at 8 C.F.R. § 103.2(b)(2) provides:

> *Submitting secondary evidence and affidavits. (i) General.* The non-existence or other unavailability of required evidence creates a presumption of ineligibility. If a required document, such as a birth or marriage certificate, does not exist or cannot be obtained, an applicant or petitioner must demonstrate this and submit secondary evidence, such as church or school records, pertinent to the facts at issue. If secondary evidence also does not exist or cannot be obtained, the applicant or petitioner must demonstrate the unavailability of both the required document and relevant secondary evidence, and submit two or more affidavits, sworn to or affirmed by persons who are not parties to the petition who have direct personal knowledge of the event and circumstances. Secondary evidence must overcome the unavailability of primary evidence, and affidavits must overcome the unavailability of both primary and secondary evidence.

See also 8 C.F.R. § 204.5(g)(1) (Other documentation relating to experience will be considered if the required letters are unavailable).

The petitioner fails to overcome the unavailability of primary evidence to establish the beneficiary's employment at The petitioner submitted a copy of a printout downloaded from website and dated September 4, 2013. The printout shows that is operational and continues to provide services and solutions to its customers. Therefore, the statement by the beneficiary's supervisor who no longer works for the qualifying employer, may not be accepted as evidence of the beneficiary's employment under the regulation at 8 C.F.R. § 204.5(g)(1) and (l)(3)(ii)(A). Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. at 158. Therefore, the AAO does not accept the employment statement as evidence of the

beneficiary's work experience. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). To be eligible for approval, a beneficiary must have the education and experience specified on the labor certification as of the petition's filing date, which as noted above, is March 29, 2011. *See Matter of Wing's Tea House*, 16 I&N Dec. 158.

Furthermore, the employment letter submitted by does not contain a description of the beneficiary's job duties. In addition, the petitioner has not established why the letter from may be acceped to prove the beneficiary's employment at Further, the beneficiary failed to list as a former employer on the labor certification. 8 C.F.R § 204.5(g)(1). Therefore, the AAO does not accept the employment statements as evidence of the beneficiary's work experience.

Accordingly, the petitioner has failed to establish that the beneficiary has the requisite 60 months (five years) of progressive post-baccalaureate experience or that he is qualified to perform the duties of the proffered position as of the priority date. 8 C.F.R § 204.5(g)(1).

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.